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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SERENA COMMUNITY ASSOCIATION, Plaintiff and Respondent, v. BREHM COMMUNITIES, INC., et al., Defendants, Cross-Complainants and Respondents.	D039445 (Super. Ct. No. 727436)
MJS ROOFING, Defendant, Cross-Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Reversed.

In this construction defect action, the plaintiff Serena Community Association (Serena) filed suit for strict liability, negligence and breach of contract against, among

others, defendant and cross-complainant Brehm Communities, Inc. (Brehm),[1] the developer and general contractor on the project, and defendant and cross-defendant MJS Roofing (MJS), which provided roofing work at the project. Brehm cross-complained against MJS for indemnity, breach of warranties, negligence, contribution and declaratory relief. Serena thereafter entered into a settlement agreement with Brehm and its insurers (the Settlement Agreement), wherein Brehm's insurers guaranteed payment of $2.6 million, with such sum being reduced by any amount Serena or Brehm could collect from any nonsettling parties.

MJS, the only nonsettling party, had declared bankruptcy in 1993 and had no assets to pay any judgment. Further, its insurance company, Superior National Insurance Company (Superior), was also insolvent. Because of Superior's insolvency the California Insurance Guarantee Association (CIGA) was responsible under statute for administering and paying any "covered claims" against Superior and its insureds, and provided a defense on behalf of MJS in the construction defect litigation.

As a defense against Serena and Brehm's claims against it, MJS asserted that because the Settlement Agreement called for a guaranteed amount to be paid by Brehm's insurers to Serena, Insurance Code section 1063[2] et seq. (the CIGA statute) barred any claims against MJS seeking to recoup some of that money. Specifically, MJS contended

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1 Brehm Communities, Inc., was erroneously sued and served as Brehm Development, Inc.

2 All further statutory references are to the Insurance Code unless otherwise specified.

there was no coverage under the CIGA statute because (1) Brehm and Serena's claims were for subrogation of amounts paid by Brehm's insurers, and (2) there was other insurance available to Brehm and Serena.

A court trial proceeded against MJS upon stipulated facts. The court rejected MJS's defense based upon the CIGA statute. Judgment was thereafter entered on Serena's complaint against Brehm and MJS, jointly and severally, and in favor of Brehm and against MJS on Brehm's cross-complaint, in the amount of $40,196.62.

MJS appeals, asserting that the court erred in entering judgment against it because the CIGA statute barred the claims asserted by Brehm and Serena against MJS because they were not considered "covered claims," as the claims were for subrogation and there was other insurance available. Brehm and Serena argue as a preliminary matter that the trial court did not, and this court does not, have jurisdiction to decide coverage under the CIGA statute in the underlying construction defect action on the claims asserted by Brehm and Serena. We conclude that we do, as the trial court did, have jurisdiction to resolve the issue of coverage under the CIGA statute. We also conclude that Brehm and Serena's claims are barred under the terms of the CIGA statute as claims for subrogation and as there was other insurance available to pay both Brehm and Serena's claims.

FACTUAL AND PROCEDURAL BACKGROUND[3]

A. *Factual Background*

Between 1990 and 1993 MJS installed roofing and sheet metal for a cement tile roof system in the model homes and phase 1 on the project, pursuant to a subcontract with the contractor and developer Brehm. At the time the work was completed MJS was insured by Superior. Superior was subsequently declared insolvent and a liquidator was appointed. Pursuant to the CIGA statute, CIGA began administering claims against Superior.

B. *Procedural Background*

In January 1999 Serena sued Brehm for construction defects at the project, asserting causes of action for strict liability, negligence and breach of contract. Brehm cross-complained against MJS, among others, asserting causes of action for indemnity, breach of warranties, negligence, contribution and declaratory relief. Serena amended its complaint to include MJS as a defendant in the main action. In May 2001 MJS answered Serena's complaint and Brehm's cross-complaint, asserting that their claims were barred or limited by the CIGA statute. Because MJS had previously declared bankruptcy, Brehm and Serena only sought damages against MJS "to the extent insurance money was available."

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[3] Much of the factual and procedural background is taken from the stipulated facts presented at the trial of this matter.

In June 2000, Serena and Brehm entered into the Settlement Agreement, which called for a total payment of $2.6 million and included the following pertinent terms: (1) Brehm's insurers were to make an initial payment of $500,000 to Serena; and (2) Brehm's insurers guaranteed an additional $2.1 million; and (3) the $2.1 million would be reduced by the amount Brehm or Serena recovered from any nonsettling parties.

In November 2001 the case against MJS proceeded to a bench trial upon stipulated facts. It was stipulated that MJS performed roofing work on the Serena project, that its work fell below the standard of care, and that the damages as a result of MJS's deficient work totaled $40,196.62. The parties also stipulated that the only funds available to pay the damages were CIGA funds. Following trial the court found in favor of Serena and against MJS and Brehm, making MJS and Brehm jointly and severally liable in the amount of $40,196.62. The court also found in favor of Brehm as against MJS on its cross-complaint and awarded it damages in the same amount.

In finding in favor of Serena and Brehm, the court rejected MJS's defense that their claims were barred by the CIGA statutes. The court first found that Serena and Brehm were not "seeking contribution, indemnity or subrogation on behalf of their carriers." Rather, the court found Serena and Brehm were "prosecuting their respective actions in their own names on their own behalves in an attempt to recover damages they personally suffered and which are attributable to MJS . . . ."

The court also found that the claims against MJS were not barred because "other insurance" was available. The court found that Serena and Brehm did not have other insurance "available to" them because (1) Serena received monies from another party's

insurance carrier and (2) Brehm only had third party insurance available to others, not itself. The court also found that the CIGA statute "only applies to first party claims."

The court thereafter entered judgment in favor of Serena and against MJS and Brehm, jointly and severally, in the amount of $40,196.62, and in favor of Brehm against MJS on the cross-complaint in the same amount. MJS timely appealed from the judgment.

DISCUSSION

A. *Standard of Review*

Because we are interpreting statutory provisions as applied to undisputed facts, we review this appeal under the independent de novo standard of review. (*Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, 65.) Under this standard we give no deference to the court's ruling or its reasons therefore. Instead, we decide the matter anew. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

B. *The CIGA Statute*

Under section 1063.1, CIGA administers "covered claims" of insolvent insurers. (§ 1063, subds. (a), (b) & (c).) "The purpose behind the creation of CIGA was to establish a fund from which insureds could obtain financial and legal assistance in the event their insurer became insolvent. [Citation.] All insurers transacting insurance business in California are involuntary members of CIGA unless exempted by the statute." (*American Nat. Ins. Co. v. Low* (2000) 84 Cal.App.4th 914, 920 (*Low*).)

CIGA's primary function is to "pay and discharge *covered claims* and in connection therewith pay for or furnish loss adjustment services and defenses of

claimants when required by policy provisions." (§ 1063.2, subd. (a), italics added.) In this regard, however, "CIGA is authorized by statute to 'pay only . . . those [claims] determined by the Legislature to be in keeping with the goal of providing protection for the insured public. [Citation.]' [Citation.]" (*Low, supra,* 84 Cal.App.4th at p. 920.)

"'Since "covered claims" are not coextensive with an insolvent insurer's obligations under its policies, CIGA cannot and does not "'stand in the shoes' of the insolvent insurer for all purposes." [Citation.] Indeed, CIGA is "expressly forbidden" to do so except where the claim at issue is a "covered claim." [Citation.] It necessarily follows that CIGA's first duty is to determine whether a claim placed before it is a "covered claim."' [Citation.]" (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1997) 60 Cal.App.4th 548, 557.)

Section 1063.1, subdivision (c) defines what claims against an insolvent insurer or its insured are covered, and which are not covered, by CIGA:

> "(c)(1) 'Covered claims' means the obligations of an insolvent insurer, including the obligation for unearned premiums, (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer; . . . [¶] . . . [¶] (5) 'Covered claims' does not include *any obligations to insurers, insurance pools, or underwriting associations, nor their claims for contribution, indemnity, or subrogation, equitable or otherwise,* except as otherwise provided in this chapter. [¶] An insurer, insurance pool, or underwriting association *may not maintain, in its name or in the name of its insured, any claim or legal action against the insured of the insolvent insurer for contribution, indemnity or by way of subrogation*, except insofar as, and to the extent only, that the claim exceeds the policy limits of the insolvent insurer's policy. . . . [¶] . . . [¶] (9) 'Covered claims' does not include (i) *any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured nor (ii) any claim by any person*

> *other than the original claimant under the insurance policy in his or her own name* . . . and does not include any claim asserted by . . . *one claiming by right of subrogation* . . . ." (Italics added.)

The statutory limitations on coverage indicates a legislative intent that CIGA "was created to provide a limited form of protection for insureds and the public, *not to provide a fund to protect insurance carriers.*" (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (1992) 10 Cal.App.4th 988, 994, italics added.)

C. *Jurisdiction To Determine CIGA Coverage*

Brehm and Serena argue[4] as a preliminary matter that the trial court did not have the jurisdiction to determine coverage under CIGA within the construction defect action as against MJS. We reject this argument.

Section 1063.1, subdivision (c)(5) provides in part that:

> "An insurer, insurance pool, or underwriting association *may not maintain, in its own name or in the name of its insured, any claim or legal action against the insured of the insolvent insurer for contribution, indemnity or by way of subrogation*." (Italics added.)

Thus, under the express language of section 1063.1, subdivision (c)(5), at least as to claims for indemnity, contribution or subrogation, an insured of an insolvent insurer such as MJS may raise as a defense in a construction defect action the prohibition against such claims provided by that section. The CIGA statute provides that such claims are statutorily barred, and therefore the insured of an insurer may raise this defense to any such claim. As we discuss, *post*, the claims presented here following the settlement of

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4 Serena has filed a joinder in Brehm's respondents brief and has not separately addressed the issues raised by MJS's appeal.

the construction defect action are just such subrogation claims barred by section 1063.1, subdivision (c)(5).

Moreover, as a more general principle, CIGA may, through its defense of an insured, raise the defense that particular claims are not covered by the CIGA statute. It need not file a separate action or wait until a judgment is entered against its insured, as Brehm and Serena claim, before challenging coverage under the CIGA statute.

Under the CIGA statute, CIGA is a necessary party in any action against the insured of an insolvent insurer:

> "*The association shall be a party in interest in all proceedings involving a covered claim, and shall have the same rights as the insolvent insurer would have had if not in liquidation, including, but not limited to, the right to*: (1) appear, defend, and appeal a claim in a court of competent jurisdiction; (2) receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and (3) investigate, handle, and *deny a noncovered claim*. . . ." (§ 1063.2, subd. (b), italics added.)

Section 1063, subdivision (g) provides that:

> "[CIGA], either in its own name or through servicing facilities, may be sued and *may use the courts to assert or defend any rights [CIGA] may have by virtue of this article as reasonably necessary to fully effectuate the provisions thereof*." (Italics added.)

Thus, although section 1063.2, subdivision (b) provides that CIGA shall have the "same rights" as the insolvent insurer would have had in litigation because claims are only allowed as specified by the CIGA statute, "CIGA cannot and does not '"stand in the shoes" of an insolvent insurer for all purposes.'" (*Saylin v. California Ins. Guarantee Assn.* (1986) 179 Cal.App.3d 256, 262.) "Indeed, CIGA is 'expressly forbidden' to do so except where the claim at issue is a 'covered claim.' [Citation.] It necessarily follows

that CIGA's first duty is to determine whether a claim placed before it is a 'covered claim.'" (*Ibid.*)

The decision in *E. L. White, Inc. v. City of Huntington Beach* (1982) 138 Cal.App.3d 366 (*E. L. White*) is instructive. In that case, E. L. White, Inc., and the City of Huntington Beach were codefendants against whom a judgment was entered in a wrongful death action and personal injury action arising from the same incident. After White's insurer, Royal Globe Insurance Companies (Royal Globe) paid half the judgment in both cases, White and Royal Globe filed suit against Huntington Beach for indemnity. However, while the action was pending, Huntington Beach's excess insurer, who would have been responsible for paying any judgment against Huntington Beach in excess of the limits of its insurance with its primary carrier, became insolvent. (*Id.* at p. 369.)

CIGA filed suit against Royal Globe and White, claiming that under the CIGA statute they could not proceed with their indemnity claim against Huntington Beach. The two actions were consolidated and the trial court awarded indemnity to White and Royal Globe to the extent of the limits of Huntington Beach's primary policy, but enjoined them from obtaining a judgment of indemnity in excess of that amount. (*E. L. White, supra,* 138 Cal.App.3d at p. 369.)

Royal Globe and White appealed, asserting that regardless of whether their indemnity claim was a "covered claim" under the CIGA statute, they could still obtain a judgment of indemnity against Huntington Beach. They asserted that the issue of whether the claim was "covered" was an issue between Huntington Beach and CIGA, and could not be determined in the action seeking indemnity. (*E. L. White, supra,* 138

Cal.App.3d at pp. 369-371.) The Court of Appeal rejected that contention. The court first held that CIGA was forbidden by the CIGA statute from "standing in the shoes of" the excess insurer because Royal Globe's claim was by right of subrogation, a claim expressly made noncovered by the CIGA statute. (*Id.* at pp. 370-371.) The Court of Appeal further held that it did not matter that the action was one for indemnity arising out of the underlying personal injury and wrongful death actions, as opposed to an action between CIGA and the insured for a determination of coverage. (*Id.* at p. 371.) The Court of Appeal held that it was improper under the CIGA statute to allow a judgment to be entered against Huntington Beach in such circumstances as the action was "merely an artifice aimed at circumventing the clear command of the Legislature" and "[was] objectionable, because the overriding purpose of the Legislature in creating CIGA was to protect just such a party as Huntington Beach, the insured of an insolvent insurer. [¶] Allowing Royal Globe to recover in this case, whether the judgment ultimately be satisfied by CIGA or by Huntington Beach, would undermine the CIGA system." (*Ibid.*)

Likewise in this case, MJS and CIGA need not wait until a judgment is entered against MJS or file a separate action to determine whether Brehm and Serena's claims are "covered claims." In fact, as the *E. L. White* case holds, the CIGA statute *forbids* entry of a judgment against the insured of an insolvent insurer on a noncovered claim. Thus, the trial court had jurisdiction, as do we, to determine whether Brehm and Serena's claims were covered by the CIGA statute.

Brehm and Serena assert that the *E. L. White* decision is distinguishable because in that case CIGA filed a separate action to determine coverage against Royal Globe, the

insurer seeking subrogation. However, as Brehm and Serena note, CIGA's action in *E. L. White* was consolidated with the action seeking indemnity from the insured. Therefore, there is no rational reason for distinguishing the facts of that case from this action. The critical point for our purposes is the *E. L. White* court's holding that judgment may not be entered against an insured of an insolvent insurer on a claim not covered by the CIGA statute.

Brehm and Serena cite *County of Orange v. FST Sand & Gravel, Inc.* (1998) 63 Cal.App.4th 353 in support of their claim that courts are without jurisdiction to determine CIGA coverage in underlying liability actions against the insured of an insolvent insurer. There, CIGA assumed the defense of an insured of an insolvent insurer in an action seeking to hold the insured liable for removing sand and gravel from county land. (*Id.* at p. 354.) CIGA filed a summary judgment motion on the ground that the claim was not covered by CIGA, which the trial court granted. (*Ibid.*) The county appealed and, in a footnote in that opinion, the Court of Appeal questioned whether it was proper to determine whether the claim was covered by CIGA in an action against the insured. (*Id.* at p. 355, fn. 2.) However, as the footnote details, in that case none of the parties addressed the issue, and the Court of Appeal also did not because it reversed the grant of summary judgment. (*Ibid.*) We believe that the question whether a court can determine CIGA coverage in an underlying liability action against the insured of an insolvent insurer has been answered in the affirmative by the terms of the CIGA statute and the holding in the *E. L. White* case.

D. *Exclusion of Claims for Subrogation*

Under section 1063.1, subdivision (c)(5) and (9), solvent insurers may not maintain an action against CIGA for either equitable or legal claims for contribution, indemnity or subrogation. (*Mercury Ins. Co. v. Enterprise Rent-A-Car Co.* (2000) 80 Cal.App.4th 41, 50.) Thus, where one of several insurers covering the same risk takes over the defense of a third party claim, that insurer may not thereafter seek contribution from GIGA if one of the other insurers becomes insolvent. (*California Union Ins. Co. v. Central National Ins. Co.* (1981) 117 Cal.App.3d 729, 734.)

In fact, CIGA bars claims for contribution, indemnity or subrogation against the insureds of insolvent insurers asserted not just by a solvent insurer, but also by persons suing on the insurer's behalf. (*E. L. White, supra,* 138 Cal.App.3d at p. 371; *Collins-Pine Co. v. Tubbs Cordage Co.* (1990) 221 Cal.App.3d 882, 887-888 (*Collins-Pine*).) This is because CIGA's purpose is to protect the insolvent insurer's policyholders as well as third persons whose claims are covered by its policies. (*Collins-Pine, supra,* 221 Cal.App.3d at pp. 885-886.) The insolvent insurer's policyholders are protected as to such claims by any person, insurer or noninsurer. (*Id.* at p. 887.)

In *Collins-Pine*, an insurer settled a tort claim brought against its insured. The insurance company thereafter sued a joint tortfeasor in the insured's name for indemnity. However, the indemnity claim was held barred because the joint tortfeasor's insurance company was insolvent. (*Collins-Pine, supra,* 221 Cal.App.3d at p. 887.) The Court of Appeal held that because no subrogation action would lie against CIGA, none was available as against the insured of the insolvent insurer: "Allowing [the] indemnity

action would thus permit [the subrogee] to be an indirect conduit to the same insurers who are barred from receiving such indemnity directly." (*Id.* at pp. 887-888.)

In *E. L. White* (discussed *ante*), after a construction company was found liable for a construction site accident, the insurer for the construction company sought indemnity from a codefendant, filing the action in the name of its insured. The Court of Appeal barred such action, stating that "the result would be the same as if CIGA made direct payment to [the insurer], an action expressly proscribed by section 1063.1. The fact that the payment would go from CIGA to a subrogated insurer through the conduit of an insured does not sanitize the transaction. Such is merely an artifice aimed at circumventing the clear command of the Legislature. [¶] . . . [¶] Allowing [the subrogated insurer] to recover . . . would undermine the CIGA system." (*E. L. White, supra,* 138 Cal.App.3d at p. 371.)

Here, the Settlement Agreement demonstrates that Brehm's cross-complaint against MJS was barred by the CIGA statute as being an indemnity action by a subrogated insurer, through its insured. First, the Settlement Agreement expressly characterizes Brehm's claims against MJS as being for indemnity and seeking such indemnity from MJS's insurance carrier:

> "BREHM was the developer of SERENA and was involved in scheduling and coordinating the different phases of construction. All of the construction, however, was performed by subcontractors pursuant to written contracts with BREHM. *Pursuant to these written contracts, the subcontractors agreed to defend and indemnify BREHM* against any and all claims, demands or liability for defective workmanship and/or materials and/or property damage caused by their work. *The subcontractors also agreed in these written contracts to obtain insurance for BREHM against claims of*

> *property damage or liability related to their work.* [¶] . . . [¶] . . . *Based on the express terms of the written contracts with its subcontractors, BREHM filed a cross-action against many of its subcontractors claiming that if [Serena's] defect claims were valid, the subcontractors were required to defend, indemnify and hold BREHM harmless from [Serena's] claims*. Further, BREHM requested that all subcontractor insurance carriers who had issued insurance policies in favor of BREHM *defend and indemnify* BREHM for the claims by [Serena]." (Italics added.)

The Settlement Agreement further states that Brehm's insurers were parties to the Settlement Agreement. The Settlement Agreement states that Brehm's insurers were responsible for paying to Serena a total of $2.6 million to settle the action, and that Serena would look to the insurers only, and not Brehm, for payment. Serena and Brehm agreed to thereafter prosecute claims against any nonsettling parties (including MJS), with any amount recovered reducing the amount Brehm's insurers were required to pay to Serena. The monies recovered by Serena and Brehm were referred to as "indemnity money." However, regardless of the outcome of Serena and Brehm's attempts to collect monies from nonsettling subcontractors, Brehm's insurers "guaranteed" they would pay Serena $2.6 million.

Thus, in this case, Brehm's insurers, in the name of their insured Brehm, were seeking indemnity for amounts they were obligated by contract to pay to Serena. It matters not that it was a contractual settlement obligation as opposed to a judgment entered against Brehm. Brehm's right to subrogation arose upon the signing of the Settlement Agreement, whether or not it had paid out any insurance funds under that agreement. (*Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 878-879.) Every dollar paid by CIGA would be used to offset amounts Brehm's insurers are obligated to pay.

The fact that monies recovered would reduce Brehm's insurer's legal obligation, as opposed to going directly into their pockets, is of no consequence. This argument is "merely an artifice aimed at circumventing the clear command of the Legislature. [¶] . . . [¶] Allowing [the subrogated insurer] to recover . . . would undermine the CIGA system." (*E. L. White, supra,* 138 Cal.App.3d at p. 371.)

Likewise, Serena's claim was also a subrogation claim filed on behalf of Brehm's insurance carriers. Serena, even though fully compensated by Brehm's insurers, was contractually obligated to continue its action on the insurer's behalf against the nonsettling parties. If any money were recovered, it would only reduce the obligation of Brehm's insurers. Serena received no benefit from pursuing its action against MJS after the settlement with Brehm. It was guaranteed payment of $2.6 million from Brehm's insurers regardless of the outcome. The *only* purpose of Serena's pursuit of the action against MJS was to potentially reduce the amount Brehm's insurers had to pay under the Settlement Agreement. Under the terms of the Settlement Agreement, Serena's claim against MJS also constituted a subrogation action brought on behalf of Brehm's insurers. Allowance of Serena's claim against MJS would thwart the purpose of the CIGA statute just as fully as Brehm's action.

In sum, we conclude that Brehm and Serena's actions against MJS, after the Settlement Agreement was executed, were barred by CIGA as they constituted actions on behalf of an insurer for subrogation, claims expressly prohibited by the CIGA statute.

E. *Exclusion for Claims Where "Other Insurance" is Available*

Because we have concluded that Brehm and Serena's claims are barred by the CIGA statute as constituting subrogation claims on behalf of an insurer, we need not address whether they are also barred because Brehm and Serena had "other insurance" available under section 1063.1, subdivision (c)(9).

However, it appears that Brehm and Serena's claims would be barred by the CIGA statute based upon the broad language of section 1063.1, subdivision (c)(9) as well. That section states that the term "'[c]overed claims' does not include (i) *any* claim to the extent it is covered by *any* other insurance of a class covered by this article *available* to the claimant or insured." (Italics added.)

Here, Brehm had insurance "available" to it to "cover" claims made by third parties. Brehm's insurers funded the entire settlement. Brehm cites to no authority for the proposition that section 1063.1, subdivision (c)(9) only applies to first party insurance, and not third party liability insurance to be paid out to others such as Serena. The CIGA statute does not limit the type of insurance that must be available, but rather includes "any" other insurance within its ambit.

Brehm and Serena cite *CD Investment Co. v. California Ins. Guarantee Assn.* (2000) 84 Cal.App.4th 1410 (*CD Investment*) in support of their argument that Brehm's third party liability insurance was not "available" to it in this action. In that case, CD Investment Company designed and built a parking garage for the City of Anaheim. Anaheim thereafter filed an action against CD Investment Company, alleging defects in the design and construction of the garage. (*Id.* at p. 1416.) A jury found in favor of

Anaheim and awarded it $4,027,000 in damages. CD Investment Company appealed and, while the appeal was pending, the parties settled the matter, with three of CD Investment Company's insurance carriers each paying $500,000, the limits of each policy. (*Id.* at pp. 1416, 1422.) CD Investment Company paid another $875,000 of its own money and had incurred $87,858.94 in attorney fees and costs in defending the action. (*Id.* at p. 1416.) CD Investment Company had two other insurance carriers who had become insolvent and contributed nothing to the settlement. (*Ibid.*)

CD Investment Company then sued CIGA, alleging that it was responsible for reimbursing it for the amounts that came out of its own pockets because of the insurance limits of the solvent insurers and the insolvency of the other carriers. (*CD Investment, supra,* 84 Cal.App.4th at p. 1417.) The trial court granted CIGA's motion for judgment on the pleadings and CD Investment Company appealed. (*Ibid.*)

The Court of Appeal reversed, finding, among other things, that the exclusion of claims under CIGA where there was other insurance available did not apply because CD Investment Company had alleged in its complaint that its claims under the insolvent insurers' policies were not covered by any other insurance. (*CD Investment, supra,* 84 Cal.App.4th at p. 1422.)

The *CD Investment* case does not support Brehm and Serena's position. First, that case was resolved by way of a judgment on the pleadings, and therefore the court was required to accept as true CD Investment's allegation that it had no other insurance available. (*CD Investment, supra,* 84 Cal.App.4th at p. 1417.) Further, in that case there was no other insurance available to CD Investment Company because the settlement

agreement there exceeded the policy limits of the solvent insurers, leaving CD Investment's only recourse a claim against CIGA for amounts covered under the insolvent insurers' policies. (*Id*. at pp. 1416, 1422.) Here, by contrast, there is no allegation that the amount of Serena or Brehm's damages exceeded the policy limits of Brehm's insurers. In fact, Brehm's insurers guaranteed the entire amount of the settlement, and Brehm was not required to go out of pocket for any amount paid to Serena.

There was also other insurance "available" to Serena for the claim it asserted against MJS. As explained above, Brehm's insurers guaranteed the entire amount of the settlement payments to Serena. Serena's right to insurance from Brehm's carriers was no different than its right to insurance from MJS's insurer, but for its insolvency. As explained above, the broad language of the CIGA statute does not exclude third-party liability insurance from the definition of other insurance "available" to a claimant such as Serena. Nor does the statute require that the "other insurance" had to be Serena's insurance as opposed to another party's. All that is required is that the insurance is "available" to pay the claim by Serena against MJS. There can be no dispute that Brehm had such insurance available to Serena, as evidenced by the Settlement Agreement.

In fact, Serena would have had a right of direct action against Brehm's insurers on their policies if they had not paid a covered claim Serena had against Brehm and if a

judgment had been entered against Brehm. (§ 11580, subd. (b)(2).)[5] The requirement that third party liability policies must allow a third party injured by an insured to file a direct action against the insurer "is a part of every policy and creates *a contractual relation which inures to the benefit of any and every person who might be negligently injured by the insured as completely as if such injured person had been specifically named in the policy*." (*Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 298.) Thus, not only was there other insurance that was "available" to Serena, it had a contractual right to such insurance. We conclude the claims of both Brehm and Serena were also barred by the exclusion contained in section 1063.1, subdivision (c)(9).[6]

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[5] Section 11580, subdivision (b)(2) provides that in California every liability policy must contain "[a] provision that whenever judgment is secured against the insured . . . in an action based upon bodily injury, death or property damage, then an action may be brought against the insurer *on the policy and subject to its terms and limitations*, by such judgment creditor to recover on the judgment." (Italics added.)

[6] For purposes of clarity, we repeat the text of section 1063.1, subdivision (c)(9), which provides in part: "'Covered claims' does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured . . . ."

DISPOSITION

The judgment is reversed and judgment is to be entered in favor of MJS and against Brehm and Serena consistent with this opinion. MJS is to receive its costs on appeal.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

McCONNELL, J.